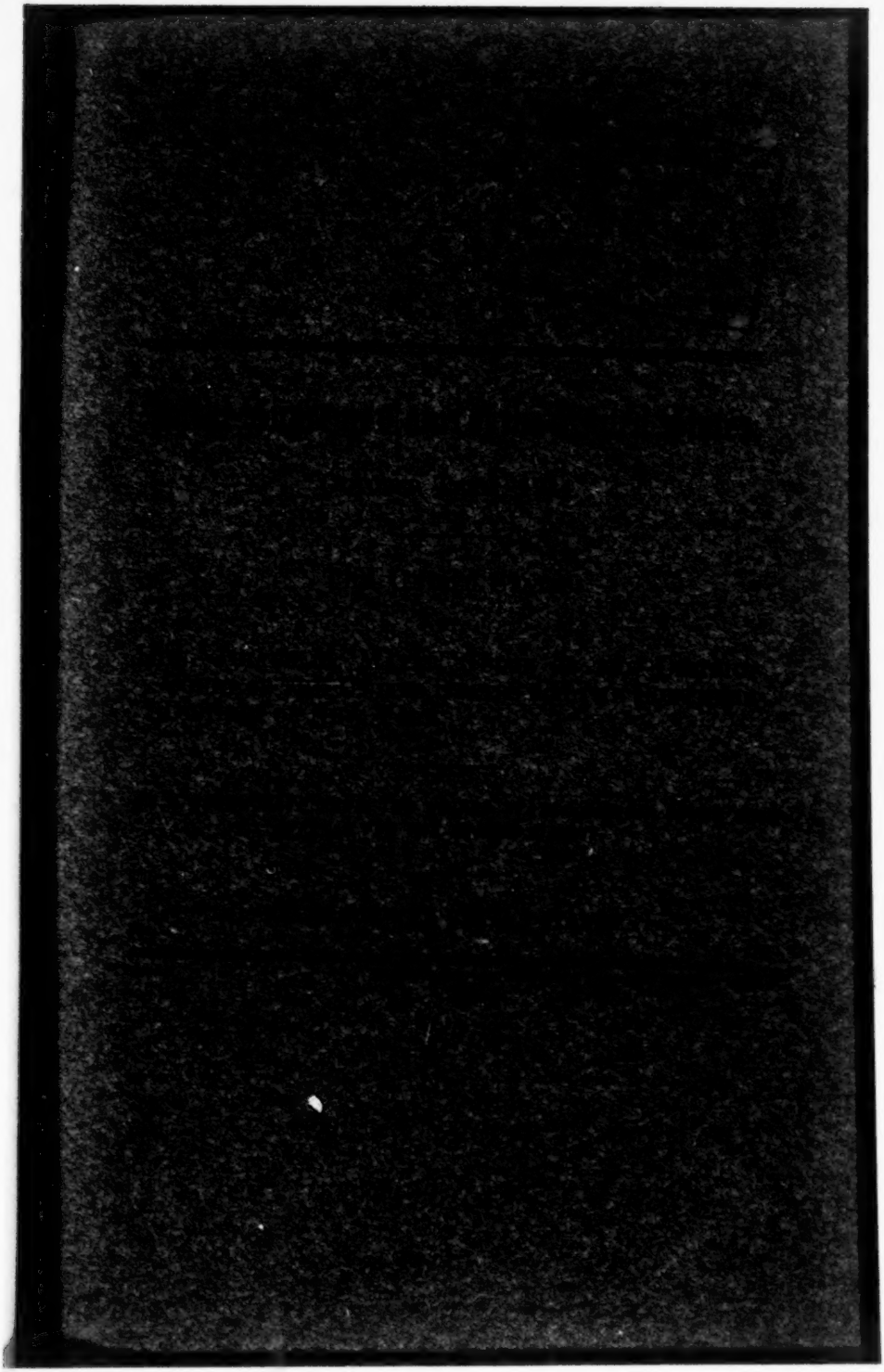

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES *v.* HON. JULIUS M. MAYER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.	No. 462.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

The facts in this case are so briefly and clearly stated in the certificate of the Circuit Court of Appeals that they need no separate statement here.

BRIEF OF ARGUMENT.

I. The Circuit Court of Appeals has jurisdiction to issue the writ of prohibition in order to prevent the threatened interference with its appellate jurisdiction by the District Court.

1. The Circuit Court of Appeals has jurisdiction of the main cause.

2. An order by the District Court awarding a new trial would be an interference with that jurisdiction against which the Circuit Court of Appeals is entitled to protect itself.
3. A writ of prohibition is the appropriate remedy to prevent this interference.

II. If the Circuit Court of Appeals lacks jurisdiction to issue the writ of prohibition this court has sole jurisdiction to issue said writ.

III. The District Court is without jurisdiction to set aside the judgment of conviction and order a new trial.
1. The expiration of the term at which judgment was entered withdrew that judgment from the control of the District Court.
2. The perfecting of the writ of error transferred exclusive jurisdiction of the cause to the Circuit Court of Appeals.

IV. The United States is not debarred from raising the question of the District Court's jurisdiction by the consent of the United States Attorney to the hearing of the motion on its merits.

ARGUMENT.

I.

The Circuit Court of Appeals has jurisdiction to issue the writ of prohibition in order to prevent the threatened interference with its appellate jurisdiction by the District Court.

1. The Circuit Court of Appeals has jurisdiction of the main cause.

The issuance of the writ of error in the case of *Freeman* v. *United States* transferred jurisdiction of that case to the Circuit Court of Appeals. *In re Chetwood*, 165 U. S. 443. Its jurisdiction attached upon the filing of the writ of error with the clerk of the District Court. *Brooks* v. *Norris*, 11 How. 203, 207; *Burnham* v. *North Chicago Street Ry. Co.* (C. C. A. 7th C.), 87 Fed. 168, 169, and cases cited.

There may be noticed here, in passing, the recital of the certificate (p. 1) that "no bill of exceptions has been settled or filed or argument had." The latter statement may be material as tending to show that the writ of error is still pending and undetermined, but the want of a bill of exceptions is quite immaterial to the present issue. Its absence cannot divest the jurisdiction of the Circuit Court of Appeals over the cause.

A writ of error will lie even though no bill of exceptions has been or can be settled, since the absence thereof does not go to the jurisdiction of the appellate court to hear and consider the case.

In re Claasen, 140 U. S. 200; *Reliable Incubator and Brooder Co.* v. *Stahl* (C. C. A. 7th C.), 105 Fed. 663.

Non constat the errors relied upon are errors of law appearing on the face of the record and as such to be availed of in the appellate court without a bill of exceptions. *Bennett* v. *Butterworth*, 11 How. 668, 676; *Baltimore & Potomac R. R. Co.* v. *Trustees*, 91 U. S. 127; *Clinton* v. *Missouri Pacific Railway*, 122 U. S. 469, 473; *Moline Plow Co.* v. *Webb*, 141 U. S. 616, 622.

Again, even were a bill of exceptions necessary, there is nothing in the certificate to show that the time within which it might be settled and filed had absolutely expired. It is true that ordinarily a bill of exceptions must be settled before the close of the term at which judgment is entered; but it may be settled thereafter by consent of the parties given during the term (*Waldron* v. *Waldron*, 156 U. S. 361, 378, and cases cited); or by an order entered during the term extending the time for settlement (*Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 298).

Whether or not any reversible errors now appear of record, therefore, the certificate sufficiently shows that the Circuit Court of Appeals had and has jurisdiction of the main cause. This court will not presume any defect in that jurisdiction, and it is clearly not for the District Court to act upon any such assumption.

2. An order by the District Court awarding a new trial would be an interference with the jurisdiction of the Circuit Court of Appeals against which the latter court is entitled to protect itself.

Whether the District Court has or has not jurisdiction to set aside the judgment of conviction and award a new trial, its doing so would interfere with the jurisdiction of the Circuit Court of Appeals. This is self-evident. The case is now before the latter court for adjudication; that court, as we have seen, has power to pass upon the alleged errors committed by the trial court and to reverse or affirm the judgment accordingly. But if the trial court sets aside the judgment and awards a new trial, there is nothing left for the appellate power of the Circuit Court of Appeals to act upon. Whether proper or improper, a more complete interference with the jurisdiction of an appellate court can hardly be imagined.

Hence, even assuming that the District Court possesses power to make the contemplated order, if the Circuit Court of Appeals (as is premised) believes that power to be lacking, it has jurisdiction to prevent, by appropriate means, the threatened invasion of its appellate jurisdiction. Its mistake in so doing would not be jurisdictional, but a mere error of law. Under the accepted definition of jurisdiction as "the power to hear and determine the subject-matter in controversy," *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 718 (see *Grignon's Lessee* v. *Astor*, 2 How. 317, 338),

the Circuit Court of Appeals undoubtedly has jurisdiction to determine whether its control over the case before it would be unlawfully invaded by the order in question; and its decision thereon would be an act within its judicial authority. See *In re Metropolitan Trust Co.*, 218 U. S. 312, 318.

As we shall hereafter show, however, the District Court is wholly without power to order a new trial. *A fortiori*, then, the Circuit Court of Appeals may protect its jurisdiction from such unwarranted interference. To hold otherwise would be to assert the inability of a superior court to prevent its jurisdiction, once vested, from being divested by the illegal proceedings of an inferior tribunal.

If prohibition is the appropriate remedy, therefore, the Circuit Court of Appeals has power, in view of the facts certified, to issue the writ in aid of its appellate jurisdiction.

3. A writ of prohibition is the appropriate remedy to prevent this interference.

Section 12 of the act of March 3, 1891, 26 Stat. 826, ch. 517, creating the Circuit Courts of Appeals, confers upon them the power given to this court and to the Circuit and District Courts by section 716 of the Revised Statutes (section 262 of the Judicial Code) "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Section 716 undoubtedly authorizes this court to issue the writ of prohibition when necessary to protect its appellate jurisdiction. It was so stated or assumed in *Ex parte Gordon*, 1 Black, 503; *Ex parte Christy*, 3 How. 292; *Ex parte Warmouth*, 17 Wall. 64; and *In re Massachusetts*, 197 U. S. 482. In the recent case of *Ex parte United States*, 226 U. S. 420, the writ was actually issued by this court in support of its appellate jurisdiction, to insure the due enforcement of its mandate.

It has been taken for granted that the Circuit Courts of Appeals, as well as the former Circuit Courts in the exercise of their appellate jurisdiction, had the same power. *In re Bininger*, 7 Blatch. 159; *In re Paquet* (C. C. A. 5th C.) 114 Fed. 437; *Zell* v. *Judges of Circuit Court* (C. C. A. 4th C.), 149 Fed. 86. The power of the Circuit Court of Appeals in this respect was accurately stated in the *Zell* case (p. 91), as follows:

> * * * It has no power to issue the writ of prohibition as an original or independent proceeding, and it has no right to issue it as ancillary to a contemplated writ of error or appeal, though it is quite apparent that cases may present themselves, after a writ of error or appeal has been perfected, in which it would not only be proper but absolutely necessary that such writ should issue in aid of its jurisdiction.

At common law, prohibition was the appropriate remedy to prevent a court of first instance from

granting a new trial in excess of its jurisdiction, *Burroughs* v. *Taylor*, 90 Va. 55; *State* v. *Walls*, 113 Mo. 42; *Quimbo Appo* v. *People*, 20 N. Y. 531, or from unlawfully proceeding further in a case pending before an appellate court. *Fite* v. *Black*, 85 Ga. 413; *State ex rel.* v. *Lewis*, 76 Mo. 370; *Livermore* v. *Campbell*, 52 Cal. 75. Its issuance in the present instance is clearly necessary to protect the existing jurisdiction of the Circuit Court of Appeals from unwarranted interference by the trial court. Indeed, aside from a writ of mandamus requiring the District Court hereafter to set aside its order granting a new trial (as in *In re Metropolitan Trust Co., supra*), it is the only remedy available for that purpose; for obviously the case is not one in which the United States can proceed by writ of error.

It follows that the Circuit Court of Appeals has jurisdiction to issue the writ if in its opnion the District Court was without jurisdiction to grant a new trial; and Question Ia should be answered in the affirmative, and Question Ib in the negative.

II.

If the Circuit Court of Appeals lacks jurisdiction to issue the writ of prohibition, this court has sole jurisdiction to issue said writ.

According to the earlier cases, the writ of prohibition, like the writs of mandamus and certiorari, was to be issued by this court under the authority of section 716 of the Revised Statutes,

above quoted, only in aid of its original or appellate jurisdiction. *Ex parte Christy*, 3 How. 292, 322; *Ex parte Gordon*, 1 Black, 503; *Ex parte Graham*, 10 Wall. 541; *Ex parte Warmouth*, 17 Wall. 64.

As was said in *In re Chetwood*, 165 U. S. 443, 462:

> * * * this writ [of certiorari] has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, c. 517, 26 Stat. 826, has been ordinarily used as an auxiliary process merely * * * ;

and the same is equally true of mandamus and prohibition.

Beginning with *In re Chetwood*, however, a more liberal use of the common law writ of certiorari is observed. In that case, it is true, the writ was allowed

> to bring up for review certain final orders of the Circuit Court, which interfered with causes pending in this court; and the question of the issue of the writ by this court in the exercise of its inherent general powers, under the Constitution, did not arise. (*In re Tampa Suburban R. R. Co.*, 168 U. S. 583, 587.)

The language used in the *Chetwood* case, however, that

> * * * whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice (p. 462),

has been applied of late by this court in several instances where neither appellate nor original jurisdiction existed, and yet where the writ of certiorari was granted because of exceptional circumstances necessitating its use. *Whitney* v. *Dick,* 202 U. S. 132, 135; *McClellan* v. *Carland,* 217 U. S. 268, 277, 279; *Mansuri* v. *Lord,* 229 U. S. 618 (*cf.* S. C. 229 U. S. 608); *Meeker* v. *Lehigh Valley R. R. Co.,* 234 U. S. 749.

In the first of these cases the writ was used to correct an excess of jurisdiction by the Circuit Court of Appeals. In the second case it was employed to remedy the erroneous refusal of the Circuit Court of Appeals to issue the writ of mandamus in order to correct a similar jurisdictional error by the Circuit Court. Neither case could have been brought here by appeal, writ of error, or certiorari under the Circuit Court of Appeals Act. In *McClellan* v. *Carland* it was said (p. 279):

> In the present case we have no doubt of the authority of this court to issue the writ of certiorari under section 716 of the Revised Statutes of the United States as construed and applied in the cases just cited—*In re Chetwood,* 165 U. S., and *Whitney* v. *Dick,* 202 U. S. *supra.* * * * While the power to grant this writ will be sparingly used, as has been frequently declared by this court, we should be slow to reach a conclusion which would deprive the court of the power to issue the writ in proper cases to

> review the action of the Federal courts inferior in jurisdiction to this court.

The same principle was recognized in *United States* v. *Beatty*, 232 U. S. 463, 467, where it is said of section 262 of the Judicial Code:

> * * * No doubt, this provision contemplates the employment of the writ of certiorari in instances not covered by §240 and affords ample authority for using the writ as an auxiliary process and, whenever there is imperative necessity therefor, as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways.

The common law writ of certiorari, it is true, cannot be used "as the substitute for an appeal or writ of error to correct mere errors committed in the exercise of a lawful jurisdiction." *United States* v. *Beatty, supra*, at 467; *United States* v. *Dickinson*, 213 U. S. 92. As was said in the latter case (p. 102):

> * * * the distinction between preventing excesses of jurisdiction and the mere correction of error is a fundamental one * * *.

Neither certiorari, mandamus nor prohibition are available where another adequate remedy exists. *In re Tampa Suburban R. R. Co., supra; In re The Huguley Mfg. Co.*, 184 U. S. 297. But where there is no such remedy, the appropriate

writ may apparently be availed of to prevent the inferior Federal courts from acting in excess of their jurisdiction.

The doctrine of the earlier cases was followed in *In re Massachusetts*, 197 U. S. 482, and *In re Glaser*, 198 U. S. 171. In the former case the court said (p. 488):

> * * * in cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus or certiorari as ancillary thereto.

In so far as these cases deny the power of this court to grant certiorari under the circumstances heretofore mentioned, they are overruled by the later cases above cited.

By analogy, the writ of prohibition is available where, as in the present case, it is the only remedy by which the usurpation of jurisdiction by an inferior Federal court can be prevented at the threshold. At common law, as we have seen, a writ of prohibition is the appropriate remedy to prevent the lower court from granting a motion for a new trial when its power to do so has ceased. No reason is seen for denying the propriety of its issuance for that purpose by this court if the Circuit Court of Appeals lacks the power to grant it.

It follows that if Question Ia be answered in the negative, Question Ib should be answered in the affirmative.

III.

The District Court is without jurisdiction to set aside the judgment of conviction and order a new trial.

1. The expiration of the term at which judgment was entered withdrew that judgment from the control of the District Court.

The principles which govern the determination of this question are fully and accurately stated in *Bronson* v. *Schulten*, 104 U. S. 410, 415:

> * * * It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.
>
> But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at

> which the judgment was rendered. And this is placed upon the ground that the case had passed beyond the control of the court.

It was urged in that case that as the question arose in the Circuit Court for the Southern District of New York, it was controlled by certain decisions of the New York courts permitting judgments to be set aside on motion after the expiration of the term. This court said (p. 417):

> * * * The cases from the New York courts * * * are largely founded on the statute of that State, and we are of opinion that on this point neither the statute of that State nor the decisions of its courts are binding on the courts of the United States held there.
>
> The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts.

This rule, that a court has no power to set aside its judgments after the term at which they were rendered, is conclusively settled for the Federal courts by repeated decisions of this court. *Pickett* v. *Legerwood*, 7 Pet. 144; *Sibbald* v. *United States*, 12 Pet. 488; *Bank* v. *Moss*, 6 How. 31;

Hendrickson v. *Hinkley*, 17 How. 443; *Phillips* v. *Negley*, 117 U. S. 665; *Hickman* v. *Fort Scott*, 141 U. S. 415; *Belknap* v. *United States*, 150 U. S. 588, 590; *Kingman* v. *Western Mfg. Co.*, 170 U. S. 675, 680; *Fuller* v. *United States*, 182 U. S. 562, 575; *Wetmore* v. *Karrick*, 205 U. S. 141; *In re Metropolitan Trust Co.*, 218 U. S. 312.

The

> exception to this rule founded upon the common law writ of error *coram vobis*, by which errors of fact might be corrected, limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert*, and the like, or error in the process through the fault of the clerk; for which writ * * * in practice, a motion is now substituted (*Phillips* v. *Negley*, *supra*, 673),

clearly does not cover the present case. *Bronson* v. *Schulten*, *supra*, 416; *Hickman* v. *Ft. Scott*, *supra*, 419. There is here no clerical mistake. It is quite as obvious that the other exception relating to bills of review in equity has no bearing on the present question.

The only possible conclusion is that the District Court is entirely without jurisdiction to issue the contemplated order setting aside the judgment of conviction and awarding a new trial. The facts certified show that no steps were taken to obtain a new trial until after the expiration of the term

at which judgment was entered. The defendant was convicted on March 14, 1913, and judgment entered on that day. (Certificate, 1.) Under the provisions of sections 8 and 97 of the Judicial Code, the next term began on the first Tuesday of the following month, that is to say on April 1, 1913. The notice of motion for a new trial was given on January 12, 1914 (Certificate, 1). It was then too late for the trial court to grant the relief sought.

Question 2 should therefore be answered in the negative.

2. The perfecting of the writ of error transferred exclusive jurisdiction of the cause to the Circuit Court of Appeals.

The writ of error in this case was sued out on March 24, 1913; assignments of error were subsequently filed; and on May 13, 1913, the Circuit Court of Appeals enlarged the prisoner upon bail pending a determination of the writ of error. Nearly eight months later the prisoner gave notice of his motion for a new trial. (Certificate, 1.)

At the time of the motion, therefore, the jurisdiction of the Circuit Court of Appeals had attached through the perfecting of the writ of error. *Burnham* v. *North Chicago Street Ry. Co., supra; Brooks* v. *Norris, supra.* The jurisdiction of an appellate court becomes complete, and that of the trial court ceases, at the time that an appeal or writ of error is perfected. *Keyser* v. *Farr,* 105 U. S. 265; *The "S. S. Osborne,"* 105 U. S. 447, 450; *Ensminger* v. *Powers,* 108 U. S. 292; *Morrin*

v. *Lawler* (C. C. E. D. N. Y.), 91 Fed. 693, and cases cited. Accordingly, when the appeal is thus perfected the trial court cannot vacate its allowance, *Keyser* v. *Farr, supra,* nor entertain a motion for substitution of an appeal bond, *Morrin* v. *Lawler, supra,* nor proceed to execute the decree appealed from; *Bronson* v. *La Crosse R. R. Co.*, 1 Wall. 405, 409; *Hovey* v. *McDonald*, 109 U. S. 150, 157; although until that time the lower court has the same power over its order allowing an appeal as over its other orders made during the term. *Aspen Mining and Smelting Co.* v. *Billings*, 150 U. S. 31, 35; *Ex parte Roberts*, 15 Wall. 384. The inferior court may, indeed, perfect its judgment or decree during the term by remedying clerical mistakes and the like, even pending an appeal. But this is a recognized exception to the general rule as to the suspensive effect of an appeal. *Hovey* v. *McDonald, supra,* 157.

It follows that, after a writ of error has been sued out and while it is pending, the trial court has no jurisdiction to set aside its judgment or to order a new trial. Such was the decision of the Circuit Court of Appeals for the Eighth Circuit in *Citizens' Bank of Wichita* v. *Farwell*, 56 Fed. 539. In dismissing a writ of error sued out to review an order of the trial court overruling a motion to set aside the judgment while a previous writ of error was pending, the court said:

> * * * The removal of the case into this court under the first writ of error trans-

> ferred the jurisdiction of the suit to this court, and the jurisdiction of the lower court over the case was at an end.

A similar result has been reached by this court in equity causes. In *Roemer* v. *Simon,* 91 U. S. 149, the Chief Justice, in denying a motion, made after an appeal had been taken to this court, to set aside the decree of the court below and grant a rehearing, said (p. 150):

> * * * It would be useless to remand this cause, * * * as the term at which the decree was rendered has passed. If the term still continued, the proper practice would be to make application to the court below for a rehearing, and have that court send to us a request for a return of the record, in order that it might proceed further with the cause. Should such a request be made, we might, in a proper case and under proper restrictions, make the necessary order * * *.

In *Ensminger* v. *Powers, supra,* in deciding that the period during which an appeal was pending in this court should not be counted against the appellant in ascertaining whether her bill of review was filed in time, it was said (p. 302):

> * * * The pendency of the appeal by Bridget Powers would have been a valid objection to the filing of a bill of review by her for the errors in law now alleged * * *. While the appeal was pending here, although there was no supersedeas, the circuit court had no jurisdiction to vacate the

> decree, in pursuance of the prayer of a bill of review, because such relief was beyond its control.

The same principle has been repeatedly proclaimed by the lower Federal courts. *Morgan's Louisiana & T. R. & S. S. Co.* v. *Texas Cent. Ry. Co.* (C. C. Tex.), 32 Fed. 525, 530 (opinion by Mr. Justice Harlan); *Kimberly* v. *Arms* (C. C. Ohio), 40 Fed. 548, 550; *First National Bank* v. *State National Bank* (C. C. A. 9th C.), 131 Fed. 430, where it was said (p. 431):

> * * * The overwhelming weight of authority of the state courts is that an appeal, properly perfected, absolutely removes the case from the trial court, and places it in the appellate tribunal. The case must, of necessity, either be in the appellate or lower court. It cannot very well be in both courts at the same time. Such a course would lead to endless confusion. Under all the ordinary rules of practice, the appellate court alone would have the jurisdiction.

In *Morrin* v. *Lawler*, *supra*, at 694, it is said:

> * * * When all the steps necessary to perfect an appeal to an appellate court have been properly taken, the action is within the control of that court, and the trial court should not engage in undoing or modifying the proceedings by which such jurisdiction has been obtained.

This rule of course does not conflict with the cases holding that where a motion for a rehearing or new trial is presented before the appeal or writ of

error is perfected, the judgment does not become final for purposes of appeal until after the disposition of the motion. *Aspen Mining and Smelting Co.* v. *Billings, supra,* 36; *Voorhees* v. *Noye Mfg. Co.,* 151 U. S. 135; *Kingman* v. *Western Mfg. Co., supra.* In *Fuller* v. *United State, supra,* 575, a decision contrary to the accepted rule was expressly based upon a special statute of Arkansas made applicable by act of Congress to the Indian Territory.

If the principle announced and applied in the above cases be sound—and their reasoning seems unanswerable—the District Court in the present case lacked jurisdiction to award a new trial after the writ of error had been sued out, quite regardless of the expiration of the term. For this reason, if for no other, Question 2 should be answered in the negative.

IV.

The United States is not debarred from raising the question of the District Court's jurisdiction by the consent of the United States Attorney to the hearing of the motion on its merits.

It might well be urged that the consent of the United States Attorney to the assumption of jurisdiction by the District Court and to the hearing of the motion on its merits, was formally withdrawn before it was acted upon by the District Court through the petition to the Circuit Court of Appeals for a writ of prohibition, and hence that it could no longer be construed as a technical waiver, binding upon the Government.

But the point may be disposed of on a broader ground,—that jurisdiction of the subject-matter cannot be conferred by consent of the parties. As was said in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 382:

> * * * Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject matter.

To the same effect are *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62; *Thomas* v. *Board of Trustees*, 195 U. S. 207, 211; *Louisville & Nash. R. R. Co.* v. *Mottley*, 211 U. S. 149, 152; *In re Winn*, 213 U. S. 458, 469; *Fraenkl* v. *Cerecedo*, 216 U. S. 295, 303.

Thus, where there is diversity of citizenship which gives jurisdiction to some district court, the objection that there is no jurisdiction in the particular district court where the suit is brought may be waived by appearing and pleading to the merits. *In re Moore*, 209 U. S. 490. Similarly, a defendant who appears and consents to a hearing and adjudication on the equity side of a Federal court is held to have waived any objection to the jurisdiction of equity if the subject-matter is within the general scope of the court's jurisdiction as a court of equity. *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Beyer* v. *LeFevre*, 186 U. S. 114, 118. But where the case is one of which no district court has jurisdiction, or where the particular court has no juris-

diction of the cause, consent of the parties is of no avail. *In re Winn, supra; Louisville & Nash. R. R. Co.* v. *Mottley, supra; Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U. S. 339, 344.

That the defect of jurisdiction in the instant case was a lack of control over the subject-matter—viz., a judgment rendered at a previous term of court—is entirely clear. As was pointed out in *Bronson* v. *Schulten, supra*, the question is one of *power;* and that is a question which cannot be solved by consent of either party.

Neither can it be argued that the consent of the United States Attorney operated to extend the term for the purposes of the motion. In the parallel case of the settlement of the bill of exceptions after the term, the consent of the parties is effective if given during the term. *Waldron* v. *Waldron, supra; Old Nick Williams Co.* v. *United States*, 215 U. S. 541. This court has carefully guarded, however, against the suggestion that consent given after the term would accomplish a like result. A subsequent order of the court purporting to extend the term after it has actually expired does not cure the defect of jurisdiction. *Reliable Incubator and Brooder Co.* v. *Stahl* (C. C. A. 7th C.), 102 Fed. 590. It would be anomalous, then, to give such curative and retroactive effect to an attempted waiver by counsel for one of the parties.

Question 3 should therefore be answered in the negative.

CONCLUSION.

Question Ia should be answered in the affirmative, and Questions Ib, 2 and 3 in the negative; or, if Ia is answered in the negative, Ib should be answered in the affirmative.

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AUGUST, 1914.

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